Supreme Court, U.S.
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No. 92-672

In The

Supreme Court of the United States

October Term, 1992

NICHOLAS G. NAVARRO,
Sheriff of Broward County, Florida,

Petitioner,

vs.

LUKE RECORDS, INC., LUTHER CAMPBELL,
MARK ROSS, DAVID HOBBS, CHRIS WONGWON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONSE IN OPPOSITION

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QUESTION PRESENTED

GIVEN THE *POPE V. ILLINOIS*, 481 U.S. 497 (1987), HOLDING THAT A WORK CANNOT BE OBSCENE IF A REASONABLE PERSON WOULD FIND THAT IT HAS SERIOUS ARTISTIC VALUE, MAY A TRIAL JUDGE DISREGARD UNREBUTTED ARTISTIC VALUE EXPERT TESTIMONY AND SUBSTITUTE HIS OWN VIEW BASED SOLELY UPON THE ARTWORK ITSELF, ABSENT A FINDING THAT THE EXPERT WITNESSES WERE NOT REASONABLE PEOPLE?

PARTIES

Petitioner

Nicholas G. Navarro, as Sheriff of Broward County, Florida[1]

Respondents

Luke Records, Inc. (formerly Skyywalker Records, Inc.)

Luther Campbell

David Hobbs

Mark Ross

Chris Wongwon (mistakenly designated Charles Wongwon in the court below)

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[1] Petitioner Nicholas G. Navarro was defeated in the 1992 Republican primary election for County Sheriff. Because this suit was brought against Navarro in his official capacity, if a decision on the Petition is not reached before Navarro leaves office in January, his successor Ron Cochran will succeed him as the named party and Petitioner in this Court. *See Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 361 (1992); Fed.R.Civ.P. 25(d)(1); Fed.R.App.P. 43(c)(1); R.S.Ct. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). The opinion of the district court (Pet. App. A) is reported at *Skyywalker Records, Inc. v. Navarro*, 739 F.Supp. 578 (S.D. Fla. 1990).

STATUTORY PROVISION

Florida Statute Section 847.001(7)

"Obscene" means the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

This case began as an action for declaratory and injunctive relief, claiming a deprivation of civil rights pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343, and seeking relief under 28 U.S.C. §§ 2201(a) and 2202(b). Plaintiffs were Skyywalker Records, Inc.,[2] which had produced the rap musical recording "As Nasty as They Wanna Be" by 2 Live Crew, and the individual members of the recording group, Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon. The Defendant, Nick Navarro, was sued in his official capacity as Sheriff of Broward County, Florida.

The Sheriff, through his agents, had obtained an ex-parte judicial determination of probable cause that "As

[2] During the course of this litigation the corporate name was changed to Luke Records, Inc.

Nasty as They Wanna Be" was legally obscene under § 847.001, Florida Statutes.[3] Sheriff's deputies distributed copies of the order to area record stores, advising sellers that continued sales of the recording would subject them to arrest and prosecution. All retail sales of the recording in the county were halted as a result of these "warnings." The Sheriff took no further legal action.

The Plaintiffs initiated their civil rights action seeking a declaration that "As Nasty as They Wanna Be" was not legally obscene, and also seeking an injunction against the Sheriff's actions as an unconstitutional prior restraint. The district court placed the burden of proof on the Defendant Sheriff, whose actions under color of state law attempted to suppress presumptively protected speech.

The district court found that the Sheriff's actions amounted to a county wide seizure of "As Nasty as They Wanna Be," and an unconstitutional prior restraint, vesting "unbridled discretion in nonjudicial officials." (Pet. App. A-72).[4] On the issue of obscenity, however, the Sheriff prevailed in the district court. The district court declared the record to be "obscene."

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[3] The Plaintiffs never prepared, published, or distributed a transcription of the lyrics of "As Nasty as They Wanna Be." Sheriff's deputies prepared and submitted a transcription of some of the songs, along with the recording, to the state circuit court judge who issued the order of probable cause.

[4] The state court judicial order of "probable cause" of obscenity was noted by the district court to have no legal effect. (Pet. App. A-67).

The critical testimony at the non-jury trial in district court consisted of expert testimony from Plaintiffs' experts. Two music critics, Gregory Baker of Miami's *New Times Newspaper*, a weekly arts and news publication, and John Leland, pop music critic for New York *Newsday*, one of the top ten circulation daily newspapers in the country, found serious artistic value in "As Nasty as They Wanna Be."[5] Rhodes Scholar and political scientist Carlton Long testified that the lyrics expressed serious political and literary themes, reflecting the cultural heritage of poor, inner city African Americans. The Sheriff presented no rebuttal testimony, but merely played the recording in open court.

The district court concluded that the Sheriff had met his burden of proving that "As Nasty as They Wanna Be" satisfied the three-pronged test for obscenity of *Miller v. California*, 413 U.S 15 (1973), and § 847.001, Florida Statutes, and was legally obscene. The Eleventh Circuit Court of Appeals reversed.

The Eleventh Circuit conceded, without deciding, that the trial judge as finder of fact could determine the "community standards" prongs of the *Miller* test. But reversal was based on the third prong of *Miller* and *Pope v. Illinois*, 481 U.S. 497 (1987), the "value" prong. The court below held that, based on the appellate record in

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[5] The district court decision never mentioned John Leland. His credentials as a pop music critic, specializing in black music, specifically hip-hop and rap, were impeccable. He was formerly music editor of *Spin Magazine*, and published articles on music in the *New York Times, London Times, Vogue*, and other periodicals.

this case, the trial judge could not rely on his own knowledge to decide the "value" prong contrary to the Plaintiffs' expert testimony:

> In *Pope v. Illinois*, the Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards.

(Pet. App. B-15)

* * *

> We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.

(Pet. App. B-16)

The Sheriff's petition for rehearing in the Eleventh Circuit Court of Appeals was denied, and he filed a timely Petition for Writ of Certiorari in this Court.

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION BELOW WAS IN ACCORD WITH THE DECISIONS OF THIS COURT

Petitioner attempts to find conflict with prior decisions of this Court by overstating the holding and significance of the decision below. The Petition for Writ of Certiorari states:

> The Eleventh Circuit has decided that as a matter of federal constitutional law, expert testimony *must be offered* by the party with the

> burden to prove obscenity, in order to meet the requirement of the third prong of *Miller*, supra, where the allegedly obscene material involves the lyrics of a musical composition.

(Petition at 14-15) (emphasis supplied). Nowhere in its opinion does the Eleventh Circuit compel expert testimony to prove musical lyrics are obscene. The essence of the decision below is that when a party defending his or her work has introduced reasonable expert testimony attesting to artistic value, a trial judge may not substitute his or her artistic perceptions to declare the work obscene. The decision below was limited to the evidence in this case. Its result is consistent with *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

Paris Adult Theater addressed the need for expert testimony in the prosecution's prima facie case for criminal obscenity and held that the state is not required to present expert testimony to prove obscenity. 413 U.S. at 55. It did not address whether rebuttal evidence might be necessary when a criminal defendant, or as in this case a civil proponent of challenged material, presents credible evidence of serious literary, artistic, political or scientific value.

The decision below neither creates the *per se* rule that Petitioner suggests, nor poses conflict with *Paris Adult Theater*. The decision below is limited to the unique facts of this case; unrebutted evidence that credible and reasonable people found the presence of artistic value which saved the record under *Pope v. Illinois*, 481 U.S. 497 (1987). *See infra* at 7. The Sheriff made no effort to rebut that evidence.

This Court held in *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485 (1983), that an appellate court's role is substantially greater when First Amendment rights are at stake than in other types of cases. Thus, whether the finder of fact is judge or jury, appellate review requires an independent review of the entire record in order to assure that important constitutional rights are protected. *See Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695, 2705 (1990). The Eleventh Circuit conducted such an independent review of the record in this case (Pet. App. B-14).

The district judge made no finding that Plaintiffs' experts were not credible or reasonable, yet he disregarded their testimony in favor of a community standard test. He stated:

> [E]ven if the undersigned judge would not find *As Nasty as They Wanna Be* obscene, he would be compelled to do so if the community's standards so required.

(Pet. App. A-33). That error, presuming that community standards dictated the outcome, ignored the lesson of *Pope v. Illinois*, 481 U.S. 497 (1987).

Pope v. Illinois clarified the three-part *Miller* standard for obscenity, and held that, unlike the "prurient interest" and "patently offensive" prongs, the "value" prong is not a community standard test.

> The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

481 U.S. at 500-501. Value is considered differently, precisely to protect the minority view from majority rule.

> [T]he mere fact that only a minority of a population may believe a work has serious value does not mean the "reasonable person" standard would not be met.

Ibid. at 501, n.9.

Thus, the Eleventh Circuit was correct in its determination that the trial court's disregard of Plaintiffs' experts, with no finding that they were not credible as witnesses, was not constitutionally justifiable when the entire record was considered. *Bose, supra.*

Petitioner also asserts conflict with *Kaplan v. California*, 413 U.S. 115 (1973). *Kaplan* held that a book without illustrations may be legally obscene based on words alone, and affirmed a state misdemeanor conviction which was obtained prior to this Court's decision in *Miller v. California*, 413 U.S. 15 (1973). At the criminal trial, both sides presented expert testimony on the content and nature of the book, although only the defense offered expert testimony on the "utterly without redeeming social importance" prong of the applicable state test for obscenity. *Kaplan*, 413 U.S. at 121. Petitioner suggests that this case and *Kaplan* present parallel questions of the state's burden of proof, and that *Kaplan* decided unequivocally that the state's burden is satisfied if the material in question is introduced into evidence

Kaplan is inapposite, first because it was not decided upon the *Miller* test, which was articulated the same day that *Kaplan* was decided, and second because it predates *Pope v. Illinois* and *Bose Corp. v. Consumer's Union*, which

guided appellate review in this case. A fair reading of *Kaplan* today, in light of those modern decisions, is that while the state may in some cases meet its burden by introducing the material in question, that may not always be sufficient, depending on the evidence which is before the trier of fact.

Petitioner has failed to present irreconcilable conflict with any decisions of this Court or with any other court which would warrant certiorari review. On the contrary, the Eleventh Circuit Court of Appeals properly applied *Miller v. California*, *Pope v. Illinois*, and *Bose Corp. v. Consumers Union*, and based its no-obscenity decision in this case on the entire appellate record.

Nor has Petitioner identified an important but unanswered question of federal law for this Court's review. Contrary to the Petitioner's assertions, the decision below was not grounded on the fact that "As Nasty as They Wanna Be" is music, as opposed to some other medium of expression. The Eleventh Circuit observed that this was "the first time that a court of appeals has been asked to apply the *Miller* test to a musical composition, which contains both instrumental music and lyrics," but proceeded to apply the *Miller* test as it would to any allegedly obscene work. (Pet. App. B-4-5). The decision below did not establish any absolute rule requiring expert testimony or rebuttal testimony in all obscenity cases. The Eleventh Circuit did discuss each of the Plaintiffs' expert witnesses' testimony (Pet. App. B-7-10), and contrasted it to the Sheriff's case, which consisted only of the playing of the recording. But the decision below did not depart from established law or create new law; it

merely recognized that in a First Amendment case, the fact-finder may be wrong:

> A fact finder, whether a judge or jury, is *limited in discretion*. "Our standard of review must be faithful to both Rule 52(a) and the rule of independent review." "The rule of independent review assigns to appellate judges a constitutional responsibility that cannot be delegated to the trier of fact," even where that fact finder is a judge.

(Pet. App. B-13-14) (emphasis supplied) (footnotes omitted).

The decision below only addressed "As Nasty as They Wanna Be," and the evidence which was presented at trial. Based on an independent review of the entire record, the Eleventh Circuit concluded:

> We reject the argument that simply by listening to *this* musical work, the judge could determine that it had no serious artistic value.

(Pet. App. B-16) (emphasis supplied). Petitioner's view that this case presents an important but unanswered question of federal law is without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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